IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/07/2002

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

T.O.S.NO.33 OF 2001

S.C. Suthanthiran .. Plaintiff

Vs.

1. Sangeetha
2. Kalpana
3. Jayanthi .. Defendants

!For Plaintiff : Mr.Inamdar Abdul Qyam

^For Defendants : Mr.R.N.Amarnath

:J U D G M E N T

This suit has been filed to allow the petitioner to prove the Will in common form and direct the grant of probate in respect thereof to them to have effect throughout the State of Tamilnadu and other reliefs as asked for in the plaint.

2. The plaint averments are as follows:

One S.Chellasamy Nadar died on 25.2.1996 and his resident was at No.310, Konnur High Road, Ayanavaram, Chennai-23. The said deceased at the time of his death left behind only the property as mentioned in the plaint and which is also set out in the Schedule appended to his Will dated 15.7.1993. It is only with regard to the said property this probate is applied for. The deceased executed a Will on 15.7.1993 and the same was registered on the same day in the presence of the witnesses whose names appear at the foot of the said Will. The same was executed at the residence of the deceased mentioned above. By the said Will, the deceased S.Chellasamy Nadar has expressly appointed the plaintiff herein as the executor of his Will. The deceased has by virtue of the said Will bequeathed al his assets immovable property to his son, the plaintiff herein. Therefore, the plaintiff is entitled to apply for and obtain a probate of the said Will in respect of the asset set out in the schedule appended in the plaint. The liabilities of the deceased have been set out in the schedule 'B' appended to the plaint. The asset which are bequeathed by the deceased to the plaintiff are the only asset left behind by the deceased. Apart from the said property, the deceased had not left behind any other property or assets or credits. The said property does not exceed on the aggregate to a sum of Rs.1,75,000/-. The net assets after deducting all the items which the plaintiff by the law is allowed to deduct are of the value

of Rs.1,74,000/-. The plaintiff undertakes to duly administer the property and credits of the above named the said deceased according to the terms of the Will and in any way concerning the Will in apportioning the net assets of his estate and administer all affairs concerning the Will only limited to the property set out in the Will and in the schedule appended hereto and by paying first his debts and then the legacy therein bequeathed so far as the assets will extend and make a true and full and true inventory thereof and exhibit the same before this court within six months from the date of the grant of the probate. The plaintiff has impleaded all the next of kin or other persons interested as party respondents. Therefore, the suit has got to be decreed as prayed for.

3. The averments in the written statement filed by the defendants 1,2 and 3 are as follows:

These defendants are the daughter's daughters of late S.C. Chellasamy Nadar. The deceased Chellasamy Nadar was bedridden for about 4 years before his death. He was very sick and he could not move about during the year 1993, when the allegedly executed the Will and he was not in a sound disposing state of mind at the time of execution of the Will. He never executed the Will. The Will was either forged or the signature of the deceased would have been taken from him while he was in unsound state of mind. The circumstances under which the Will was allegedly executed and the fact that his another son is totally excluded from getting the property shows that the plaintiff had played fraud and he is trying to get probate of the Will. The schedule mentioned property is worth more than Rs.60 lakhs. The plaintiff is trying to appropriate the property of the deceased excluding the other legal heirs of the deceased Chellasamy by creating a Will. The Will was executed by the deceased on 15.7.1993 and the same was registered on the same day in the presence of witnesses are denied. The Will was executed at the residence of the deceased is also false. The plaintiff is suppressing the material facts from the Court. Hence, the plaintiff is not entitled to get probate. Therefore, the suit has got to be dismissed with costs.

4. On the above pleadings by the respective sides, the following issues were framed:

1. Whether the Will executed by the deceased S.Chellasamy Nadar on 1 5.7.1993 as alleged by the plaintiff in the plaint is true, genuine and valid?
2. Whether the plaintiff is entitled for the issue of probate as asked for in the plaint?

5. The plaintiff has filed the suit seeking grant of probate alleging that his father Chellasamy Nadar executed his last Will and testament on 15.7.93 in a good and sound disposing state of mind at his residence at Door No.310 Konnur High Road, Ayanavaram, Chennai – 600 023 , in the presence of two attesting witnesses found therein. The grand-daughters of the said Chellasamy Nadar through Varalakshmi have contested the suit by stating that the Will was either forged or the signature of Chellasamy Nadar would have been obtained from him while he was in unsound state of mind and the Will has not come into existence as stated by the plaintiff and the plaintiff have also suppressed the material facts and hence the suit has got to be dismissed.

6. Arguing for the plaintiff, learned counsel would submit that the plaintiff originally filed O.P.; that on contest the same has been converted into a testamentary suit; that the father of the plaintiff Chellasamy Nadar has executed his last Will land Testament marked as Ex.P1 in

a sound and disposing state of mind; that the same was registered on the very same date; that the Will property was his selfacquisition; that due to his old age and ill-ness he desired to make arrangement in respect of the property which let him to Ex.P1 Will; that in order to prove that the said testament was attested by two witnesses Nemichand and Sivaprakasam, the plaintiff was able to examine the second attesting witness namely Sivaprakasam since the first attesting witness Nemichand was dead; that the second attesting witness was examined as D.W.2 who has categorically deposed clinching evidence as to the execution and attestation of the testament; that the said Chellasamy Nadar had two sons and two daughters; that out of the two daughters one pre-deceased him; that it is pertinent to note that the younger brother of the plaintiff and one of the sister of the plaintiff who is alive have not contested this proceedings but the daughters of the pre-deceased daughter have contested the proceedings; that at the time of execution of Ex.P1 testament, Chellasamy Nadar did not have any other immovable property except the one found under the Will; that Chellasamy Nadar during his life time has performed the marriage of both of his daughters and that the second son who was employed in M.R.F, due to strained relationship with his father was living away and did not exercise any care over his father but it was only the plaintiff and his family who took care of Chellasamy Nadar during his old age; that those circumstances compelled Chellasamy Nadar to execute a Will bequeathing the entire property to his first son; that under such circumstances it was thoroughly natural for him to execute such a testament; that even during the lifetime of Chellasamy Nadar he has executed a Power of Attorney in favour of the plaintiff for collection of rents from the tenants occupying a part of the property; that the said Power of Attorney is filed as Ex.P2; that there are minor discrepancies between the averment in the affidavit of the attesting witness and his evidence in Court which cannot in any way take away the truth or genuineness of the Will; that there is nothing to show that the plaintiff had any role or participation in the preparation, attestation or registration of Ex.P1 document; that from the evidence of P.W.2 attesting witness, it would be clear that he was present at the time of preparation of the Will and the same was properly executed by the testator and attested by the witnesses; that P.W.2 has well explained that he was present at the time when Chellasamy Nadar signed in the first page under Ex.P1 Will and struck it off stating that it was not right and there after set his signature for the second time in the said page; that the defendant is unable to show any circumstances to disbelieve the evidence of the attesting witness; thus the plaintiff has proved the execution, attestation of the document as required by law and hence it is a fit case to grant probate in favour of the plaintiff as asked for.

7. Vehemently opposing the contentions of the plaintiff side, learned counsel for the defendant interalia would submit that the plaintiff has not properly proved the execution or attestation of the document as required by law; that the testimony of P.W.2 examined as one of the attesting witnesses stands contrary and different from the affidavit filed by him; that the same would indicate that the Will could not have been executed as averred in the plaint and cast a doubt whether the Will came into existence as putforth by the plaintiff; that the attesting witness has deposed that the Will was not shown to him after the registration but P.W.1 has stated that it was shown to him; that Chellasamy Nadar had no other property except one in question during the relevant time; that his second son who was employed was

living in a rented house ; that the plaintiff who was employed in Civil Supplies Corporation for the past 25 years; that during the relevant time he was living with his father and there was no special reason or circumstances for the testator to exclude his second son, a daughter and the grand-daughter through the pre-deceased daughter; that this exclusive disinheritence would reveal that the testament is not true and genuine; that it is admitted by P.W.1 that Chellasamy Nadar as executed a Power of Attorney in his favour to collect the rent from the tenants since he found it very difficult. Under such circumstances, it could not have been possible for the testator to prepare the document as found in Ex.P1 without the active participation of P.W.1 but P.W.1 has come forward that he had no knowledge about the document at the time of preparation, execution and registration but he came to know after a month from his father's death that it would be indicative of the falsity of the plaintiff's case; that during the relevant period Chellasamy Nadar was bed-ridden due to sickness and he was not able to move about; that the plaintiff taking undue advantage of the situation has fabricated Ex.P1 document and thus there exists so many suspicious circumstances over the truth and genuineness of the Will but the propounder has not dispelled any one of the suspicious circumstances; that since the propounder has not proved the truth , execution and attestation of the document as required by law and in view of the unexplained suspicious circumstances, the Court has to refuse the relief as asked for.

8. Admittedly, Chellasamy Nadar had two sons by name Suthanthiran, the plaintiff herein and S.C.Sugumaran and two daughters namely Varalakshmi and Vijayalakshmi. Wife of Chellasamy Nadar pre-deceased him. The marriages of both sons and daughters were performed by Chellasamy Nadar. The plaintiff was employed in Tamil Nadu Civil Supplies Corporation for a long time, while his younger brother was employed in Madras Rubber Factory (M.R.F). The Will property namely the house situated in Door No.310,Konnur High Road, Ayyanavaram, Chennai, absolutely belonged to the testator. The plaintiff and his family were all along living with the testator in the said house. The second son and the married daughters of the testator were living separately. Except the contesting defendants all others remained exparte. Except the Will mentioned immovable property, Chellasamy Nadar neither owned any immovable nor moveable properties.

9. The plaintiff has come forward with a request to issue probate in respect of a registered will dated 15.7.93 alleging that the same was executed by his father Chellasamy Nadar in a sound and disposing state of mind and in the presence of ing witnesses namely M.Nemichand and N.Sivapragasam at his residence situated in Door No.31 0, Konnur High Road, Ayanavram, Chennai. The plaintiff has examined himself as P.W.1. He has deposed that during the relevant time his father was in a sound disposing state of mind; that one month after his father's death when he was cleaning his father's box, he found Ex.P1 Will in the records therein. Thus according to the plaintiff he had no knowledge about the execution, attestation and registration of the testament under challenge. In order to prove the execution and attestation Ex.P1 testament, the plaintiff has examined Mr.Sivapragasam as P.W.2 stating that the other attesting witness Nemichand was no more. P.W.2 has deposed that he was present when Ex.P1 Will was being written at the office of Advocate Subramania Iyer at Purasawalkam; that Chellasamy Nadar took him to that office; that he knew about the contents of

Ex.P1 Will; that the same was registered on 15.7.1993 at the office of the Sub-Registrar,Annanagar; that Chellasamy Nadar, Nemichand and himself were present at the time of registration and that Chellasamy Nadar signed in the said Will in the office of the SubRegistrar in the presence of Sub-Registrar; that during the crossexamination P.W.2 has deposed that Chellasamy Nadar has executed the document and himself and the first attesting witness have also attested the said document Ex.P1 in the office of the Sub-Registrar, Anna Nagar. The affidavit of P.W.2 filed by the plaintiff which is marked as Ex. P3 reads as follows: " That on 15.7.93, I was present together with Mr.M.Nemichand, at the house of the deceased S.Chellaswamy Nadar, at No.310, Konnur High Road, Madras- 600 023,and I did then and there see the said deceased set and subscribe his signature at foot of the Testamentary paper in the Tamil language..". "That thereupon the said Mr.M.Nemichand, at the request of the said deceased and in presence and in the presence of each other all being present at the same time set and subscribe their respective names and si gnatures at the foot of the Testatmentary Paper as witnesses thereto. I was present at that time." As per the affidavit as seen above, the place of execution of Ex.P1 Will was at Door No.310, Konnur High Road, Ayyanavaram,Chennai, and not the Sub-Registrar's Office at Annanagar. Ex.P1 Testament, which is under challenge is in English language. As per the recital in the affidavit the document that was executed by Chellasamy Nadar and attested by P.W.2 Sivaprakasam was in Tamil language. P.W.2 has affirmed and sworn to the affidavit on 25.7.1993. The plaintiff has deposed that he has shown Ex.P1 Will to P.W.2 and Nemichand. Contrary to the same, P.W.2 has stated that he did not see Ex.P1 subsequently to the registration in 1993. P.W.2 had gone to the extend of denying the affidavit by stating that the plaintiff did not approach him and asked his signature in any document. It remains that it was a sworn affidavit filed by one of the attesting witnesses wherein he has narrated the place, time, manner of execution and attestation of the testament. If the deponent makes any deviation from the averments in the affidavit at the time of evidence, a duty is cast upon the propounder to dispel the suspicion and doubt that might attendant on it. Under any circumstances, the statutory requirements as to the proof of execution and attestation cannot be done away with. The law has laid down the provisions as to the proof of execution and attestation as mandatory not only to ensure that the execution and attestation of the document have taken place in the manner alleged by the propounder, but also to satisfy the conscience of the court to see whether the testator has executed the document out of his free will and volition, and the testament is not affected by any external influence or tainted with any one of the invalidating factors. The real intention of the testator could be assessed in his proper perspective only if there is acceptable and satisfactory proof of execution and attestation as required by law. All the above would naturally would create doubt whether P.W.2 would have attested Ex.P1 testament at all.

10. Many are the suspicious circumstances attendant on the truth and genuineness of Ex.P1 testament. Admittedly, the testator Chellasamy Nadar had no other property except the one found under the Will. He had two sons namely, the plaintiff and his younger brother and two daughters. The contesting defendants are the daughters of one of the pre-deceased daughter of Chellasamy Nadar. Thus during the relevant time Chellasamy Nadar had his children namely the plaintiff, his second son, one of the daughters and grand

children also. Even as per the version of plaintiff, the property is worth Rs.25 lakhs. The second son Chellasamy Nadar is residing separately in a rented house. The plaintiff was employed in Civil Supplies Corporation,while his younger brother was employed in M.R.F. There is nothing to indicate that the second son of Chellasamy Nadar has any other source of income except his salary or has he owned any other property. The plaintiff is unable to show any strong or compelling reasons which impelled Chellasamy Nadar to execute a will as one in question bequeathing the entire property worth Rs.25 lakhs to the plaintiff excluding all his children and grand children. The Court is of the view that the said exclusion and disinheritance of the natural born children would cast a strong suspicion over the testament. P.W.1 has admitted that after the death of his father he contacted his younger brother and informed him that he would give half share in the Will property after the same was registered in his name but the compromise talks failed. Likewise he has contacted the contesting defendants namely Sangeetha, Kalpana and Jayanthi and offered them amounts for not-contesting the instant proceedings but they were not amenable. Had it been true that Chellasamy Nadar had executed a Will as found in Ex.P1, there was no necessity for the plaintiff to offer share in the property. Another circumstances which creates suspicion over Ex.P1 testament is that the plaintiff has prepared and given the defendants the translated xerox copies of the Will, the Power of Attorney in English language and the translated copy of several Power of Attorney which were marked as Ex.D1,2 and 3 , would reveal that they bear the signatures of Chellasamy Nadar. When questioned about the same the plaintiff had answered that he did not remember whether his father's signature was there in the copy of Ex.D1 and D3 when he xeroxed those documents. It is needless to say that only if the signature was found in Ex.D1 and D3 the same could appear in the xerox copies. The plaintiff is unable to explain how the signature of Chellasamy Nadar is found in the xerox copies which were prepared from the translated copies of Ex.P1 Will and Ex.P2 Power of Attorney. It is pertinent to note that Chellasamy Nadar had executed Power of Attorney in favour of the plaintiff after 4 or 5 months from the date of the alleged execution of Ex.P1 Will. The plaintiff admits that his father executed the Power of Attorney as he found it difficult to collect the rent by himself. The plaintiff has also admitted that both the attesting witnesses were known to him for a long time. From the available evidence it could be well seen that all other children of Chellasamy Nadar except the plaintiff were living separately and during the relevant time, the plaintiff and his family members alone were residing with Chellasamy Nadar in the Will property. Taking into consideration the age of Chellasamy Nadar and the health condition of Chellasamy Nadar during the relevant period he could not have prepared Ex.P1 Testament, except with the assistance and active participation of the plaintiff. Hence,the statement of the plaintiff that he had no knowledge about the Will and he came to know one month after his father's death, when he found Ex.P1 Will along with other records would indicate that he is suppressing the real state of affairs and has come with the false plea that he had no knowledge as to the preparation, attestation and execution of the document. All the above would go to show that Ex.P1 testament could not have come into existence without the active role and participation of the plaintiff in the preparation, execution and attestation of Ex.P1 testament. The signature of the testator in the first page is scored off and the signature was made for the second time in the first page of Ex.P1

testament. It is contended by the plaintiff that the correction was made by the testator himself. The plaintiff has not summoned any official from the Registrar office or produced the register maintained by the SubRegistrar to prove the contention that the first signature of Chellasamy was struck off and he has signed for the second time. In the instant case, there are so many suspicious circumstances as stated above. But the propounder has failed to dispel any one of the suspicious circumstances to the satisfaction of the Court before the Court accepts the Will as genuine.

11. The Court is of the view that the following decisions of the Apex Court are squarely applicable to the present facts of the case.

In A.I.R. 1990 S.C. P-396 (KALYAN SINGH V. CHHOTI AND OTHERS, the Apex Court has held as follows:

" A Will is one of the most solemn documents known to law. The executant of the Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is therefore, essential that trustworthy and unimpeachable evidence should be produced before the Court to establish genuineness and authenticity of the Will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order to Judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature of the contents of the documents itself. It would be also open to the court to look into the surrounding circumstances as well as inherent improbabilities of the case to r each a proper conclusion on the nature of the evidence adduced by the party."

In A.I.R. 1998 S.C. 2861(GURDIAL KAUR AND OTHERS V. KARTAR KAUR AND OTHERS) the Apex Court has held as follows:

" The law is well stated that the conscience of the Court must be satisfied that the Will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925, but it should also be found that the said Will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel suspicious circumstances.

In A.I.R. 1982 S.C. P-133 (INDU BALA BOSE AND OTHERS V.L MANINDRA CHANDRA BOSE AND ANOTHER), the Apex Court has held as follows:

"The mode of proving the Will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a Will by S.63 of the Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus.

Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the Court accepts the Will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator,

the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations. Any and every circumstance is not a ' suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person."

12. Applying the above tests given by the Apex Court, it has to be necessarily held that the propounder of Ex.P1 Will has failed to dispel all the suspicious circumstances surrounding the execution of the Ex.P1 Will. The Court is of the view that the plaintiff has not satisfied the conscience of the Court. Hence, for the reasons stated and the discussions made above, the Court is unable to accept the contentions of the plaintiff so as to grant probate as asked for. Therefore, the plaintiff has not proved that Ex.P2 Will is true, valid and genuine. All the above issues are answered accordingly.

13. In the result, the Suit is dismissed and there shall be no order as to costs.

22-07-2002
Index: Yes/No
Internet:Yes/No
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List of witnesses:
1. P.W.1 – S.C.Suthanthiram
2. P.W.2 – N.Sivaprakasam
List of Exhibits:
1. Ex.P1 – Will
2. Ex.P2 – Death certificate of Chellasamy Nadar
3. Ex.P3 – Affidavit of N.Sivaprakasam
4. Ex.P4 – Affidavit of M.Nemichand
5. Ex.D1 – Translated copy of Ex.P1 Will
6. Ex.D2 – Copy of Power of Attorney
7. Ex.D3 – Translated copy of Power of Attorney.

vsi

M.CHOCKALINGAM.J.,
vsi

Judgment made in
T.O.S.No.33 OF 2001